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No. 77-637

In the Supreme Court of the United States

OCTOBER TERM, 1977

MICHAEL GEORGE REEVE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is not yet reported (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1977. A petition for rehearing with suggestion for rehearing *en banc* was denied on August 25, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on September 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence seized from petitioners' vans and airplane should have been suppressed as fruits of an illegal search or seizure.

2. Whether the district court committed reversible error in deferring a hearing on petitioners' motion to suppress until the close of the government's evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioners were convicted of conspiring to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and 846 (Pet. 11). Petitioner Thompson was sentenced to four years' imprisonment plus a two-year special parole term, and petitioners Reeve and Harris were each sentenced to 18 months' imprisonment plus a two-year special parole term.[1] The court of appeals affirmed (Pet. App. A).

The government's evidence established that late in the afternoon of November 19, 1975, two Arizona police officers observed several persons conversing near parked vehicles in the Red Lake area of Arizona, a barren desert region regularly used by marijuana smugglers to land their aircraft (Tr. 97-98, 101-102, 108, 375, 527). When the officers returned later that evening to investigate, they noticed a red van and a brown van stopped near the known landing area (Tr. 102-107, 123). During the night and early morning hours of November 19 and 20, 1975, both vans were moved; co-defendant Law drove the brown van into Nevada, where Nevada agents saw Law meet John "Bigfoot" Larson, a convicted marijuana smuggler (Tr. 302-306, 621-623). The vans rendezvoused on the morning of November 20 and proceeded toward the Red Lake corral (Tr. 138-139). A twin-engine gold and white aircraft appeared overhead almost immediately

[1]Co-defendant Law received the same sentence as Reeve and Harris.

and began circling the Red Lake area (Tr. 141-142). The two vans and the aircraft proceeded north along highway 93 (Tr. 145). Nevada police proceeding south on the highway sighted the aircraft flying very low toward them and hovering over the red and brown vans (Tr. 308-310, 627-629). The Nevada police turned and began following the vans, which maneuvered evasively in an apparent attempt to detect whether they were being followed (Tr. 311, 314, 369-370, 629). The police believed that the aircraft—which periodically flew off and returned to fly over the vans—was in communication with the vans, because the vans had antennae for citizen's band radios (Tr. 114, 629-630). The Nevada police followed the vans until they stopped at a gas station in Boulder City, Nevada, where the police decided to halt the vans in order to investigate the behavior of its occupants and their association with the airplane (Tr. 341, 647-648, 689, 760, 763).

As the brown van started to roll out of the gas station, the police pulled across the highway and blocked the exit (Tr. 319, 686). Two of the officers walked towards the red van, which was creeping forward (Tr. 319, 687, 755). The officer in front of the red van yelled "State Narcotics. Stop" and held up his badge (Tr. 351-352, 687). At that point petitioner Reeve stepped on the gas pedal so that the van lurched forward (Tr. 320, 687, 755, 993). When the van lurched forward, the officer pulled out his gun and told the driver (petitioner Reeve) to "[s]top and get out of the vehicle" (Tr. 687, 755, 760). The officers asked petitioners for some identification (Tr. 688). While examining the identification the police officers noticed a strong odor emanating from the brown van, which the officers believed to be marijuana (Tr. 320-321, 355-356, 689). A search revealed that the van contained 720 pounds of marijuana (Tr. 356, 689-691). Petitioners were then arrested (Tr. 653, 691).

A customs agent traveling in a surveillance aircraft had followed the suspect airplane until it landed at a brothel called Sheri's Ranch in Nevada (Tr. 576-577, 592). After the agent also landed there, he had the pilot, petitioner Thompson, called from the brothel and asked him to produce some identification (Tr. 593-594). Thompson falsely identified himself as Larry Gene Madden and stated that his pilot papers were in the aircraft (Tr. 594-596). With Thompson's permission, the customs pilot sat in the aircraft while Thompson searched for his identification papers (Tr. 596). Since it was windy and cold, the customs pilot and petitioner Thompson remained in the aircraft until the arrival of the other police officers about an hour later (Tr. 596-597, 611). The two pilots engaged in small talk, and invited a second customs agent into the plane (Tr. 597, 611). At no time did petitioner ask to leave the aircraft (Tr. 604-605, 609). When the additional officers arrived, petitioner gave permission for a full search of the aircraft (Tr. 666, 678-679). Marijuana traces and bits of debris were found, and petitioner was then placed under arrest (Tr. 666).

ARGUMENT

1. Petitioners do not deny that, under the circumstances of this case, founded suspicion existed justifying an investigative stop of the vans. Rather, they contend (Pet. 11-28) that all evidence seized from the vans should have been suppressed because the blocking of the gas-station exit and the stopping of the vans at gunpoint transformed any investigative detention into a full-fledged arrest (and subsequent search) requiring probable cause.[2]

[2]On appeal only petitioners Reeve and Harris raised this issue (Pet. App. 47). Since petitioner Thompson did not raise this question below he is precluded from raising it now. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n. 7. In any event, it would appear that petitioner Thompson lacks standing to raise this issue.

This contention, however, ignores the fact that the agents originally intended only to make an investigatory stop,[3] and that one officer drew his weapon only when one of the vans lurched forward, as if petitioners might try to escape. As the court of appeals correctly concluded (Pet. App. 48):

> A police officer attempting to make an investigatory detention may properly display some force when it becomes apparent that an individual will not otherwise comply with his request to stop, and the use of such force does not transform a proper stop into an arrest. [Citations omitted.]

See, *e.g.*, *United States* v. *Richards*, 500 F. 2d 1025 (C.A. 9), certiorari denied, 420 U.S. 924; cf. *United States* v. *Diggs*, 522 F. 2d 1310, 1314-1315 n. 4 (C.A. D.C.). Indeed, since one of the officers was in front of the van as it lurched forward, the officers clearly had a right to take steps to protect themselves. This result is fully consistent with *Terry* v. *Ohio*, 392 U.S. 1, and *Adams* v. *Williams*, 407 U.S. 143, which recognize that it is proper for police officers to effect a brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information.[4] Just as an officer making such an investigative stop is entitled to protect himself by conducting a limited search for

[3]The district court found that probable cause to search the vans existed even before they were stopped, but the court of appeals found it unnecessary to reach this issue (Pet. App. 49 n. 1).

[4]As the court of appeals observed, *United States* v. *Ramos-Zaragosa*, 516 F. 2d 141, 144 (C.A. 9), *United States* v. *Larkin*, 510 F. 2d 13, 14 n. 1 (C.A. 9), and *United States* v. *Strickler*, 490 F. 2d 378, 380 (C.A. 9), upon which petitioners rely, are inapposite, because they did not involve investigatory stops that were properly initiated through unarmed requests that suspects stop and answer questions.

concealed weapons, so he is entitled to display some force when a suspect refuses to stop, particularly when his vehicle instead lurches toward the officer in a menacing fashion.

Since the investigative stop of the vans was proper, the subsequent search and arrests of petitioners Reeve and Harris were likewise valid. When the officers who were examining petitioners' identification detected the heavy odor of marijuana emanating from the vans, they clearly had probable cause to search the van (see, *e.g.*, *Bowen* v. *United States*, 422 U.S. 916, 918 n. 1), and their discovery of the marijuana then justified the arrest of petitioners (Pet. App. 49).

2. Petitioners also contend (Pet. 40-44) that evidence seized from the aircraft should have been suppressed because it was the fruit of petitioner Thompson's unlawful arrest.[5] However, as the district court found, Thompson consented to the search of the aircraft, and he was not arrested until the marijuana was discovered there (Tr. 1185, 173). The customs pilot who followed petitioner to Sheri's Ranch testified that Thompson gave him permission to "look" and "go into the airplane" (Tr. 607-608), and accordingly he sat with petitioner in the aircraft until the rest of the officers arrived. One of the agents who subsequently arrived at the ranch testified that petitioner consented to his searching the aircraft (Tr. 666, 677-679). Although petitioner Thompson testified that he had not consented to a search of the plane (Tr. 1008, 1112), the district court, after weighing the credibility of the witnesses, found that Thompson had consented to both the entry (or "search") by the customs pilot, and the full

[5]Only petitioner Thompson raised this issue below. See n. 2, *supra*.

search by the second agent (Tr. 1185). The court also found that petitioner had not been in custody or under arrest until he was formally arrested after the discovery of marijuana in the airplane (Tr. 173).[6]

The record fully supports the conclusion of the court of appeals that the finding of consent was not clearly erroneous and that under "the totality of all the circumstances" petitioner freely consented to the search of his airplane (Pet. App. 50-51). See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227.[7] There is no occasion for further review of this finding.

3. Finally, petitioners contend (Pet. 29) that it was error to defer the hearing on the motions to suppress until after the close of the government's case in chief. At no time did counsel for petitioners object to this procedure (Tr. 87). In fact, the record clearly shows (Tr. 819-827) that counsel consented to the postponement of the hearing. Under these circumstances, the court of appeals correctly concluded (Pet. App. 51) that petitioners suffered no prejudice that could possibly render the trial court's decision "plain error" under Rule 52(b).

[6]Petitioners suggest (Pet. 41) that Thompson was already under arrest at the time the airplane was searched. The trial court's conclusion that Thompson was not placed under arrest until after the marijuana was discovered in his plane (Tr. 173) is also supported by the record, and not clearly erroneous. In any event, as the court of appeals correctly observed (Pet. App. 50), even if Thompson were already under arrest at the time he consented to the search, under these circumstances his consent would still have been voluntary. *United States* v. *Watson*, 423 U.S. 411, 424-425.

[7]The record also supports the trial court's additional finding that apart from Thompson's consent there was probable cause to search the airplane, since the agents who made the search then knew of the discovery of the marijuana in the vans Thompson's aircraft had been circling and following, and they could reasonably expect to find evidence linking the airplane and its occupant with the vans and their occupants.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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